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# IN THE
# SUPREME COURT OF THE UNITED STATES

October Term, 1995

SHERIFF JAY PRINTZ
&
SHERIFF RICHARD MACK

*Petitioners,*

v.

UNITED STATES OF AMERICA
*Respondent*

ON WRIT OF CERTIORARI TO THE
U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF AMICUS CURIAE OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

1. Whether Congress exceeds its enumerated powers when it prescribes federal duties for state officials and orders state officials to enforce federal regulations.

2. Whether the Statute, by attempting to abrogate the sovereign immunity of the states, violates the Eleventh Amendment.

3. Whether the unconstitutional portions of 18 U.S.C. §922(s) are severable.

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## IDENTITY AND INTEREST OF AMICUS CURIAE

Both petitioners and respondent have graciously consented to the filing of this brief, which supports the position of the petitioners.

The National Rifle Association of America, chartered in 1871, is a nonprofit, nonpartisan, nationwide organization of over 3 million members and over 10,000 affiliated clubs.

The NRA is not only the oldest sportsmen's organization in America, but also is an educational, recreational, and public service organization dedicated to the right of the individual citizen to own and use firearms for lawful recreation and defense.

The NRA is a New York not-for-profit corporation with its principle place of business in Fairfax County, Virginia, and it is supported by membership dues and contributions from public-spirited members and clubs. It is not affiliated with any arms or ammunition manufacturer nor with any business which deals in firearms or ammunition. It receives no appropriations from Congress.

The National Rifle Association has previously filed numerous *amicus curiae* briefs in both state and federal courts. Because this case involves the sale or transfer of firearms, the resolution of this case will effect NRA members, who include sheriffs. Issues in this case include the 10th Amendment and severability. The Court will be assisted by the expertise that the National Rifle Association has developed in this field, and thus, by the filing of *amicus'* brief.

## STATEMENT OF THE CASE

Federal law prohibits the transfer of firearms to, or possession by, certain classes of persons, including, *inter alia*, persons convicted of or indicted for certain offenses, illegal aliens, users of illicit drugs, fugitives from justice, persons who have been the subject of certain mental adjudications, persons dishonorably discharged from the armed forces, persons who have renounced their American citizenship, and persons subject to certain domestic restraining orders. 18 U.S.C. §922(d), (g), & (n).

In 1993 Congress enacted Public Law Pub. L. 103-159, 107 Stat. 1536 (1993) ( "Statute"). The Statute envisions an eventual permanent system whereby each handgun purchaser would be checked against an automated federal database of prohibited persons. Since no such federal database existed, the statute created an "interim system" under which all duties would be placed upon state officials for five years, or until the federal system is funded and functional.

18 U.S.C. §922(s) requires that each federally licensed firearms dealer ("Federal Firearms Dealer") is required to send a federal form ("Federal Form"), giving notice of each handgun sale, delivery or transfer to a designated state official, the "Chief Law Enforcement Official" ("CLEO"), a statutory term which includes state, and excludes federal, law enforcement officials. 18 U.S.C. §922(s)(1)(A)(i)(III) and (s)(8).

The CLEO is required to: review all such Federal Forms received from Federal Firearms Dealers; determine, after consulting federal databases, if any such purchase violates any federal, state or local law; and to report the results to the Federal Firearms Dealers. The CLEO shall "ascertain within 5 business days whether receipt or possession would be in



violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General." 18 U.S.C. §922(s)(2). The Attorney General of the United States has designated two federal databases as the "national system" which the CLEO must check. Order No.1853-94, at 59 *Federal Register* 9498 (Feb. 28, 1994).

The CLEO must make all "reasonable" attempts at these determinations. The federal government's advice to CLEOs provides that the CLEOs' duties go beyond a simple scan for criminal convictions:

> [A] reasonable effort should be made to determine whether the buyer has a criminal record that would make the sale unlawful. Criminal record systems can reveal that the buyer is a fugitive, is under indictment, or has been convicted of a felony. The criminal record systems may also indicate that the buyer is possibly an unlawful user of controlled substances or has had mental health problems. In some States, centralized mental health records may also be available.

Brief for the United States on Petition for Certiorari, *Printz v. United States*, at 14a.

If the CLEO finds that the proposed sale, delivery or transfer, would not violate federal, state or local law, the Statute commands him to destroy the Federal Form and any references to it within twenty (20) business days. 18 U.S.C. §922(s)(6)(B). If the CLEO finds that the proposed purchaser is ineligible to receive a handgun, he must so inform the Federal Firearms Dealer and, if the purchaser requests, provide a written justification of his findings. 18 U.S.C. §922(s)(6)(C). The Statute creates a federal cause of action against the CLEOs'

"State or political subdivision" by the denied purchaser for correction and recovery of attorneys' fees. 18 U.S.C. §925A.

The Statute shifts the primary burden of enforcing the federal Statute onto the state official, requiring the state official to review the Federal Form and to consult federal records designated by a federal official to determine whether each proposed sale by a federally-licensed Federal Firearms Dealer would meet federal statutory standards.

## OPINION BELOW

The opinion of the United States Court of Appeals is reported as *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995). The opinions of the United States District Court are reported as *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994), and *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994). This Court granted the petition for certiorari on June 17, 1996.

Petitioners commenced actions in the United States District Court, District of Arizona and the United States District Court, District of Montana seeking declaratory and injunctive relief, challenging the Statute on the grounds that it exceeded Congress' Article I powers and violated the Tenth Amendment. The District Courts held that the Statute's mandate exceeded Commerce Clause powers and violated the Tenth Amendment. *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994); *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994). The district courts relied upon this Court's decision in *New York v. United States*, 505 U.S. 144 (1992), in declaring unconstitutional those parts of 18 U.S.C. §922(s) which purport to impose duties upon state officials.

A 2-1 majority of the Ninth Circuit, in *Mack v. United*



*States*, and *Printz v. United States*, 66 F.3d 1025 (9th Cir. 1995), held that the duties which the Statute compels CLEO's to perform did not violate the Tenth Amendment nor exceed the enumerated powers of Congress.

The subject matter of this case has created a split in the Circuits on a question which involves the delegated powers of Congress, under Article I, section 8, cl. 3 of the Constitution, and the reserved powers of the States, under the Tenth Amendment to the Constitution.

In May 1993, Sheriff Samuel Frank, Sheriff of Orange County, Vermont, commenced an action in the United States District Court, District of Vermont seeking declaratory and injunctive relief, challenging the Statute on the grounds that it exceeded Congress' Article I powers and violated the Tenth Amendment. The District Court, relying upon this Court's decision in *New York v. United States*, 505 U.S. 144 (1992), held that those sections of the Statute which impose ministerial duties upon the CLEO are unconstitutional. *Frank v. United States*, 860 F. Supp. 1030 (D. Vermont 1994). The Second Circuit Court of Appeals reversed in part and affirmed in part, holding that the duties imposed by the Statute do not exceed the delegated powers of Congress, or violate the Tenth Amendment. *Frank v. United States*, 78 F.3d 815 (2nd Cir. 1996).

In a decision issued six (6) days after the decision in the *Frank* case, the Fifth Circuit, in *Koog v. United States*, and *McGee v. United States*, 79 F.3d 452 (5th Cir. 1996), held that the ministerial duties imposed upon the CLEOs, including the duty to perform a background check, the destruction of records, and the duty to furnish written justification for denials, violated the Constitution.

The decision of the Ninth Circuit in the instant case, and the decision of the Second Circuit in *Frank*, are not congruent with the decision of this Court in *New York v. United States*, 505 U.S. 144 (1992), and said decisions are in direct conflict with the decision of the Fifth Circuit in *Koog* and *McGee*.

The Fifth Circuit correctly applied the most recent and directly applicable case law enunciated by this Court in *New York v. United States*, while the Second and Ninth Circuits evaded the holding of this Court in *New York*.

## SUMMARY OF ARGUMENT

In enacting the Statute, Congress shifts the primary burden of enforcing this federal Statute onto state officials, commandeering them to review Federal Forms submitted by a federally licensed Federal Firearms Dealer regarding a federally regulated transaction, and to consult and cross check federal records and federal databases designated by a federal official to determine whether each proposed sale, delivery or transfer by a Federal Firearms Dealer would meet federal statutory standards; all of this in regard to a transaction in which the CLEO would otherwise not be involved.

This federal mandate exceeds the authority granted to Congress to "regulate commerce . . . among the several States." U.S. Const., Art. I, §8, cl. 3. Sheriffs Mack and Printz are not Federal Firearms Dealers, nor do they otherwise engage in or affect interstate commerce in firearms. It is the federal Congress which seeks to force such state officials to affect and become a party to interstate commerce in firearms. The ruling of the Ninth Circuit Court of Appeals treats as dispositive the mere fact that others in the CLEO's county engage in such commerce. Under this extraordinary reading, the Commerce Clause extends to inaction, and, therefore, effectively extends



the Commerce Clause to any and all things.

The Statute's mandate to state officials to undertake ministerial duties violates the Tenth Amendment as defined by this Court in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408 (1992). The Ninth Circuit Court of Appeals suggests that *New York* be read only to bar Congressional coercion of state policy making, as opposed to the conscription of state officials to administer and enforce federal regulations. The Ninth Circuit Court of Appeals' holding violates the very holding of *New York*, in which this Court held that "[t]he Federal Government may not compel the States to enact *or* administer a federal regulatory program." *New York v. United States*, 505 U.S. at 188, 112 S.Ct. at 2435 (emphasis added).

If the Ninth Circuit's holding is upheld, then the federal government will be given a green light to commandeer the states to perform federal tasks for free, and the states will eventually be robbed of their funds, their resources and their independence; a pattern that will ultimately result in the destruction of federalism.

The Statute, by creating a civil cause of action against the CLEO's "State or political subdivision," constitutes an attempt by Congress to abrogate the states' sovereign immunity in violation of the Eleventh Amendment.

Congress has consistently refused to enact legislation providing for registration of firearms and their owners. Under the interim system, Federal Firearms Dealers are required to send a form giving notice and statement of each proposed handgun sale, delivery or transfer to their CLEO. 18 U.S.C. § 922(s)(1)(A)(iii) & (iv). This is a duty imposed on the Federal Firearms Dealer, who is not a party to this case. The receipt and retention of such records by a CLEO would be inconsistent

with the mandate of 18 U.S.C. § 926(a), which forbids "any system of registration of firearms, firearms owners, or firearms transactions or dispositions...." Hence, merely severing the constitutionally flawed provisions of 18 U.S.C. § 922(s) that impose a duty on the CLEO, including the task of destroying records to prevent registration, would defeat Congressional intent because it would create a registration system. Federal Firearms Dealers would continue to send records to local law enforcement and local law enforcement would no longer be required to conduct background investigations and then destroy the records. They would just retain the records. To avoid defeating Congress's intent of nonregistration, all of §922(s) should be declared nonseverable and voided.

## ARGUMENT

### I. THE STATUTE EXCEEDS CONGRESS' ENUMERATED POWERS AND VIOLATES THE TENTH AMENDMENT.

"The Constitution created a Federal Government of limited powers." *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 2399, 115 L.Ed.2d 410 (1991). The Constitution "[b]eing an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." 3 J. Story, Commentaries on the Constitution of the United States 752 (1833). "It is in this sense that the Tenth Amendment 'states but a truism that all is retained which has not been surrendered.'" *New York v. United States*, 112 S.Ct. at 2418, quoting *United States v. Darby*, 312 U.S. 100, 124, 61 S.Ct. 451, 85 L.Ed. 609, 132 ALR 1430 (1941).

"The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are



to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). "This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'" *United States v. Lopez*, 514 U.S. ___, 115 S.Ct. 1624, 1626 ,131 L.Ed.2d 626 (1995), quoting *Gregory v Ashcroft*, 501 U.S. at 458, 111 S.Ct. at 2400 (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Ibid.*

Among the express powers granted by the Constitution to Congress is the authority "to regulate commerce . . . among the several States." U.S. Const., Art. I, §8, cl. 3. While this power is near-plenary in regard to matters that substantially affect interstate commerce, with "no limitations other than those prescribed in the constitution," *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824), its scope is restricted to regulation of "commercial intercourse," and that "among the several states." *Id.* at 189-90.

In *Lopez*, this Court identified the "three broad categories of activity that Congress may regulate under its commerce power:" the channels of interstate commerce, protection of instrumentalities of interstate commerce, and acts which substantially affect interstate commerce. *United States v. Lopez*, 115 S.Ct. at 1629-30. If a state engages in or affects interstate commerce, it is subject to regulation; to the extent that a state restricts commerce, its act is subject to pre-emption. *See Fry v. United States*, 421 U.S. 542, 548 (1975) (engaging in commerce through employment); *EEOC v. Wyoming*, 460 U.S. 226 (1983) (same).

However, in the instant case Congress has not chosen to preempt state regulation, nor has Congress chosen to regulate the channels or instrumentalities of interstate commerce or the act which substantially affects interstate commerce. Congress has instead chosen to regulate the states themselves. Congress has in effect issued commands to state officials, not on the basis that the CLEOs have engaged in or impeded interstate commerce, but on the basis that they have failed to become so engaged.

While firearms may flow in interstate commerce, the CLEOs, who are impressed into federal service by the federal Statute, are not Federal Firearms Dealers, but are state officials exercising state police powers assigned to them by the state. The state CLEOs are not a part of nor even remotely involved in the firearms transaction that Congress wishes to regulate. Except to the extent that the Statute forces them to be involved, the CLEOs would have no role in the regulated activity at all. This inaction is "in no sense an economic activity." *United States v. Lopez*, 115 S.Ct. at 1634. The CLEOs do not engage in nor interfere with interstate commerce when they refuse to review the Federal Forms and supervise Federal Firearms Dealers. This refusal to affect commerce is not even an "activity." *Id.* at 1663 (Breyer, J. dissenting).

This Court has held that when weighing whether an act of Congress is passed pursuant to the Commerce Power, the regulated activity must not merely "affect" interstate commerce, but must "substantially affect" interstate commerce. "We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *United States v. Lopez*, 115 S.Ct. at 1630.

The CLEO's "inaction" in regard to the regulated



transaction certainly can not be held to "substantially affect" interstate commerce; in fact, it does not affect the regulated interstate activity at all, and said inaction is, therefore, beyond the scope of federal regulation pursuant to the Commerce Power.

In the instant case, the Ninth Circuit brushed aside the Commerce Clause issue by simply noting that firearms move in interstate commerce and that the Statute focuses on the sale rather than simple possession. According to this logic, the fact that private citizens in a state engage in commerce gives Congress the power to commandeer state officials. This is directly contrary to the holding in *New York*. Despite the fact that nuclear waste travels in and affects commerce, this Court held that Congress could not commandeer states to take it.

The fact that a given subject or transaction may in general come under the interstate commerce power does not mean that Congress may order the states to administer or enforce the federal law regarding the subject. "The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate State governments' regulation of interstate commerce." *New York v. United States*, 112 S.Ct. at 2408.

Thus, while Congress may use the interstate commerce power to regulate the sale of firearms by Federal Firearms Dealers, Congress does not have the power to commandeer state officials to administer such federal regulations. This is especially true when the attempted "exercise of national power intrudes upon an area of traditional state concern," such as duties to be assigned to local law enforcement. *United States v. Lopez*, 115 S.Ct. at 1638 (Kennedy, J., concurring).

"We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York v. United States*, 112 S.Ct. at 2423. *See also*, *FERC v. Mississippi*, 456 U.S. 742, 762-766, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288-289, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Lane County v. Oregon*, 7 Wall, at 76, 19 L.Ed. 101 (1869).

Congress may use a variety of means to induce states to assist in regulatory programs. "This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices." *New York v. United States*, 112 S.Ct. at 2423. For example, under the spending power Congress may attach conditions to the receipt of federal funds, and Congress may offer States the choice of regulating in accordance with Congressional wishes, or having state regulation preempted by federal regulation. *New York v. United States*, 112 S.Ct. at 24-23-2424.

In *Hodel*, and in *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982) (FERC), incentives were offered to states for undertaking certain regulatory programs. If the States chose not to do so, the federal government would preempt. In neither case were the states compelled to enact legislation, nor to promulgate regulations. "This Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *FERC v. Mississippi*, 456 U.S. at 761-762, 102 S.Ct. at 2139.

Such a command is not permissible because the power



of the national government operates directly upon the people, not on the states.

> In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority . . . to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . . The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

*New York v. United States*, 112 S.Ct. at 2423.

In the instant case, the Ninth Circuit concluded that *New York* does not bar federal mandates to State officials to enforce, as opposed to enact, federal programs:

> The Brady Act is not the kind of a federal mandate condemned by *New York* ... [T]he CLEOs are not being commanded to engage in the central sovereign processes of enacting legislation or regulations. ... Instead, they are directed to serve for a temporary period as law enforcement functionaries in carrying out a federal program.

*Mack v. United States*, 66 F.3d at 1031.

In dissent, Judge Fernandez argued that the enforce/enact distinction was inconsistent with the teaching of *New York*. In fact, the dissent argued, the latter would be the greater infringement of federalism:

> Rather than ordering state legislatures or agencies to adopt a scheme for vetting requests for gun transfers, Congress has avoided that hindrance and dragooned the state officials directly. Under this new approach, the states have nothing to say about it. Their officials are ordered to become part of a federal gun control program at the state's own expense and are ordered to engage in various tasks necessary to administer that program. . . . If the Tenth Amendment has anything to do with the separate sovereign dignity of the states, it is difficult to see how that dignity is not undermined by the reality of a command that they commit their resources to the carrying out of this kind of federal policy, whether they like it or not.

*Id.*, at 1035 (Fernandez, J., dissenting).

The Ninth Circuit's reading of *New York*, that New York prohibits only federal coercion of state policy making, as opposed to federal conscription of state officials to enforce federal regulations, violates the holding of *New York* that "[t]he Federal Government may not compel the States to enact *or* administer a federal regulatory program." *New York v. United States*, 505 U.S. at 188, 112 S.Ct. at 2435 (emphasis added).

In reaching its decision in *New York*, this Court distinguished those Tenth Amendment cases in which the issue was the authority of Congress to subject state governments to generally applicable laws. These cases include *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528



(1985)(Fair Labor Standards Act); *Fry v. U.S.*, 421 U.S. 542 (1975)(wage stabilization), and *South Carolina v. Baker*, 485 U.S. 505 (1988) (tax exemption on the interest on municipal bonds). *New York v. United States*, 112 S.Ct., at 2420. The Court found these cases inapplicable since the legislation at issue, in *New York*, was not applicable to private parties. "This case presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties. . . . This case instead concerns the circumstances under which Congress may use the States as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way." *Id.*

As noted above, *New York* held that *Garcia* applies only when Congress has subjected a state to the same legislation applicable to private parties; i.e., when Congress imposes a rule of general applicability which also applies to the states. The Statute is clearly not such a law. The duties imposed upon the CLEO are not imposed upon the general public; said duties apply exclusively to state officers. *New York v. United States*, 112 S.Ct., at 2420.

The Second Circuit relied on *Garcia* to produce the opinion that this Court reversed in *New York*. *New York v. United States*, 942 F.2d 114, 119 (2d Cir.1991). Despite this Court's holding in *New York* about *Garcia*'s import, the Second Circuit again relied on *Garcia* to uphold the Statute's mandate that CLEOs perform background checks. *Frank v. United States*, 78 F.3d 815 (2nd Cir. 1996). The Second Circuit has wrongly applied *Garcia* again.

In New York, the Government unsuccessfully argued that any Tenth Amendment prohibitions can be overcome if the federal interest is important enough. *Id.*, at 2429. The Court

responded:

> No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to preempt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents. *Id.*

The Government also argued that ". . . the Constitution does, in some circumstances, permit federal directives to state governments." *Id.* The Court flatly rejected this assertion. "Various cases are cited for this proposition but none support it." *Id.*

When the federal government attempted in 1975 to force state agencies to enforce federal standards under the Clean Air Act, the Fourth, Ninth and District of Columbia Circuits held that such an attempt would exceed the Commerce Clause and violate the Tenth Amendment. *See State of Maryland v. EPA*, 530 F.2d 215, 227-28 (4th Cir. 1975); *Brown v. EPA*, 521 F.2d 827, 837-39 (9th Cir. 1975); *District of Columbia v. Train*, 521 F.2d 971, 992 (D.C. Cir. 1975) ("We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing nonconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist."). *But see Pennsylvania v. EPA*, 500 F.2d 246 (3d Cir. 1974).

After this Court granted certiorari in said cases, the U.S. Solicitor General declined to defend the challenged regulations,



*see* Brief for the Federal Parties, *EPA v. Brown* (No. 75-909) at 20 n.14. This Court then remanded for consideration of mootness. *EPA v. Brown*, 431 U.S. 99 (1977). On remand, the Ninth Circuit held portions of the Tenth Amendment challenge still justiciable and struck the regulation. The federal government left the ruling unchallenged. *Brown v. EPA*, 566 F.2d 665 (9th Cir. 1977).

What the federal government viewed as an indefensible position in 1977, the federal government now asserts. This is the more surprising in light of this Court's recent holding that:

> While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation, the Framers did not intend that Congress should exercise that power through the mechanism of mandating State regulation. The Constitution established Congress as a 'superintending authority over the reciprocal trade' among the States, The Federalist No. 42, p. 268 (C. Rossiter, ed. 1961) by empowering Congress to regulate that trade directly, not by authorizing Congress to issue trade-related orders to State governments.

*New York v. United States*, 505 U.S. at 166, 112 S.Ct. at 2430-2431.

The Statute compels state officials to perform investigations of potential purchasers in a federally regulated transaction and to review Federal Forms received from a Federal Firearms Dealer, and then to either to destroy said Federal Forms, or to furnish, if requested, a written explanation if the potential purchaser appears to be ineligible to possess a firearm. Like the "take title" provisions in *New York*, the

Statute is a direct command to state officials to perform federal services under a federal regulatory program. Like the "take title" provisions struck down in *New York*, the Statute's commands to state officials violate the Tenth Amendment and exceed the Commerce Clause powers.

The Ninth Circuit decision is directly contrary to this Court's holdings, and attempts to extends the Commerce Clause to the point where it abrogates federalism altogether. If the federal government can use its Commerce Clause powers to force state officials to supervise commerce to Congressional specification, then states are no more than unpaid regional offices of the national government. But that may not be, because, as this Court has held, "States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government." *New York v. United States*, 505 U.S. at 188, 112 S.Ct. at 2434.

Even the United States has previously admitted this. In briefing *New York* before this Court, the United States tried to defend the subject federal statute from a Tenth Amendment challenge by stating that such statute did "not constitute the kind of impermissible commandeering about which the Court expressed concern in *Hodel* and *FERC*" and that such statute was "qualitatively different from the implementation of federal policies regulating private activity, which would transform state administrative bodies into 'field offices of the national bureaucracy.'" Brief of the United States, *New York v. United States*, at 36-37, *quoting FERC v. Mississippi*, 456 U.S. at 777.

By the Ninth Circuit's logic,

> ... there is no state governmental function which Congress cannot reach and control. . . . The states can be forced to act or not to act, as Congress chooses to define the burden. They have no refuge but obedience, since if they act--or fail to act--with greater or less vigor than Congress deems useful, they transgress its power and offend the Constitution. The traditional remedy of unwilling states, abandonment of the field to direct federal control, is barred.



David Salmon, *The Federalist Principle: Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act*, 2 Col. J. Environ. L. 290, 326-27 (1976).

The Ninth and Second Circuit's holdings violate the Constitution and are contrary to this Court's holding in *New York*. "Whatever the outer limits of . . . sovereignty may be, one thing is clear: the federal government may not compel the states to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. at 188, 112 S.Ct. at 2435.

## II. THE STATUTE IS DESTRUCTIVE OF FEDERALISM.

If the Ninth Circuit's holding is upheld, the result will be the inevitable destruction of federalism.

When Congress was considering the Statute, it rejected an amendment which would have forced the Federal Bureau of Investigation to conduct the background checks. H.R. Rep. No. 103-344, 103rd Cong., 1st Sess., at 7 (1993). Instead, the federal Congress chose to burden state officials with conducting such federally mandated duties. The Statute is an attempt by Congress to appropriate state funds and resources to pay for programs which Congress thought wise to enact and for which Congress will claim credit, but which the states will bear the burden of enforcing and funding. This diminishes the ability of

states to perform other governmental functions. If this Court allows Congress to so appropriate state resources, then it is certain that more such appropriations will take place. As the federal government is allowed to commandeer the states to perform federal tasks for free, the states will eventually be robbed of their funds, their resources and their independence.

> If Congress is allowed gratuitously to order the states to perform federal tasks, it will not have to pay for what it gets. As ideas for federal projects grow but resources lessen, the incentives will grow stronger for Congress to command the state government to perform federal programs for free.

Lipner, *Imposing Federal Business on Officers of the States: What the Tenth Amendment Might Mean*, 57 Geo. Wash. L. Rev. 907, 928 (1989). *See also* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 15 (1988)("Congress has recently forced State and local governments to administer national programs at State expense. This technique permits Congress to escape fiscal accountability for its actions."); Ronald Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. Pa. L. Rev. 289, 312-13 (1984)("If the federal government is willing to assume the full burdens of direct regulation it will not impose regulations without carefully considering the costs involved.")

Such federal appropriations of state resources pose additional dangers to the very concept of federalism.

> [I]f the national government compels the states to enforce federal regulatory programs, state budgets and executive resources reflect federal priorities rather than



> the wishes of local citizens. These results are antithetical to the popular control exerted in a republican form of government.

Deborah Merritt, *The Guarantee Clause and State Autonomy: Federalism For A Third Century*, 88 Col. L. Rev. 1, 61 (1988).

In *New York*, this Court predicted that such federal "commandeering" would undermine the very core of federalism, permitting the federal government to shift accountability to the states.

> [W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. . . . [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

*New York v. United States*, 505 U.S. at 169, 112 S.Ct. at 2424. *See also* Merritt, 88 Colum L Rev, at 61-62; La Pierre, *Political Accountability in the National Political Process--The Alternative to Judicial Review of Federalism Issues*, 80 N.W.U.L. Rev 577, 639-665 (1985).

## III. THE STATUTE VIOLATES THE ELEVENTH AMENDMENT.

The Eleventh Amendment to the United States

Constitution provides that "[the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State." U.S. Const., Amend. XI.

"Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'" *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 134 L.Ed.2d 252, 1996 U.S. LEXIS 2165 (1996), quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779,111 S.Ct. 2578, 115 L. Ed. 2d 686 (1991). This Court reaffirmed, in the very recent case of *Seminole Tribe of Florida*, that the Eleventh Amendment stands for the two part presupposition that "each State is a sovereign entity in our federal system;" and, secondly, that it is inherent in the nature of a state's sovereignty not to be amenable to suit without the state's consent. *Seminole Tribe of Florida v. Florida*, 1996 U.S. LEXIS at 2181. See also *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L. Ed. 842 (1890), and The Federalist No. 87, p. 487 (C. Rossiter ed. 1961) (A. Hamilton). "For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Seminole Tribe of Florida v. Florida*, 1996 U.S. LEXIS at 2181, quoting *Hans v. Louisiana*, 134 U.S. at 15.

In *Seminole Tribe of Florida*, this Court specifically overruled a contrary precedent which was from approximately the same time as *Garcia*. *Seminole Tribe of Florida v. Florida*, 1996 U.S. LEXIS at 2168, over-ruling *Pennsylvania v. Union Gas* Co, 491 U.S. 1 (1989).



"We hold that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity , the Indian Commerce Clause does not grant Congress that power, and therefore [the statute at issue] cannot grant jurisdiction over a State that does not consent to be sued." *Seminole Tribe of Florida v. Florida*, 1996 U.S. LEXIS at 2166-2167. This is so despite the fact that "the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause." *Id.*, 1996 U.S. LEXIS at 2194.

The Statute, by creating a civil cause of action against the CLEO's "state or political subdivision" for an erroneous denial, constitutes an attempt by Congress to abrogate the states' sovereign immunity in violation of the Eleventh Amendment. 18 U.S.C. § 925A.

## IV. THE UNCONSTITUTIONAL PORTIONS OF 18 U.S.C. §922(S) CANNOT BE SEVERED FROM THE VALID PORTIONS.

18 U.S.C. §922(s)'s imposition of duties violates the Tenth Amendment and exceeds Commerce Clause powers. The question remains whether §922(s) falls, or only some severable portion of it. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 691 (1987), teaches that legislative history should be reviewed to determine whether a constitutionally flawed provision in a statute is severable or nonseverable. Severing only the constitutionally flawed portions of the statute would leave a statute that creates a registration system at the level of chief law enforcement official. Congress's refusal to enact firearm and firearm owner registration requires a finding that § 922(s) is nonseverable.

### A. National Firearms Act

Congress enacted a firearm registration statute only once. The 1934 National Firearms Act covered a narrow field of firearms: e.g., machine guns, short barrelled shotguns, and short barrelled rifles. 26 U.S.C. § 5841, 5845. Ordinary rifles, shotguns, pistols, and revolvers were not included in the registration requirement. H.R. Rep. No. 1780, 73d Cong., 2d Sess. 1-2 (1934). See also David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumberland L. Rev. 585, 593 (1987). All efforts at registration have subsequently been defeated.

**B. Property Requisition Act**

In 1941, shortly before Pearl Harbor, Congress enacted the Property Requisition Act. 55 Stat. 742 (1941). It specifically provided that nothing in the act would be construed "to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport ... [or]... to impair or infringe in any manner the right of any individual to keep and bear arms ...."[1] The prohibition against registration and protection of the right to bear arms were inserted because of the unhappy experiences with Hitler and Stalin. 87 Cong. Rec. 6778 (1941)(Rep. Edwin Arthur Hall). It was felt that granting extraordinary powers to the Executive did not warrant an infringement of personal rights and liberties expressed in the Constitution. H.R. Rep. No. 1120, 77th Cong., 1st Sess. 2 (1941).

**C. 1968 Gun Control Act**

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[1] For recent expositions on the right to bear arms see Joyce Lee Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 162 (Harvard Univ. Press 1994); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L. J. 1236 (1994); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L. J. 1193 (1992).



Registration proposals were defeated in what became Title I of the 1968 Gun Control Act. P. L. 90-618. Rep. McClory introduced an amendment to register handguns. 114 Cong. Rec. 22248 (1968). Rep. Bingham offered an amendment to Rep. McClory's amendment so that registration would also apply to rifles and shotguns. 114 Cong. Rec. 22255. Rep. McClory's amendment to register handguns was defeated 168 to 89. 114 Cong. Rec. 22267. Rep. Bingham's amendment was defeated 172 to 68. 114 Cong. Rec. 22266.

Rep. McClory then offered an amendment requiring licensing. 114 Cong. Rec. 22745. It was defeated by a vote of 179 to 84. 114 Cong. Rec. 22763.

Arguments in the House against registration and licensing included claims that a federal dossier would be created on every citizen. 114 Cong. Rec. 22268 (Rep. Griffin). Licensing was opposed as another modified form of registration. 114 Cong. Rec. 22748 (Rep. Sikes).

Rep. Latta reminded the House that registration and licensing were rejected. 114 Cong. Rec. 30580.

In the Senate, Sen. Tydings offered an amendment requiring registration and licensing. 114 Cong. Rec. 27149-27150. Sen. Tydings' amendment was defeated. 114 Cong. Rec. 27421. Sen. Tydings then offered an amendment providing for handgun licenses. 114 Cong. Rec. 27457-27458. It was defeated. 114 Cong. Rec. 27460.

Sen. Jackson proposed an indirect approach to registration by denying federal firearm licenses to gun dealers in states that do not require registration and transmittal to NCIC. 114 Cong. Rec. 27422. This was defeated. 114 Cong. Rec. 27427.

Sen. Brooke proposed an amendment that would have provided for direct registration at the local and federal level.

Re-registration would be required whenever a gun owner would change his residence. 114 Cong. Rec. 27428-27429. The amendment was rejected. 114 Cong. Rec. 27456.

Sen. Hruska reminded the Senate that registration and licensing issues were met four square and rejected. 114 Cong. Rec. 30184.

**D. The Firearms Owners' Protection Act**

The Firearms Owners' Protection Act, P.L. 99-308, 100 Stat. 449 (1986), provided that 18 U.S.C. § 926(a) specifically not require the registration of firearms and their owners: "No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established. Nothing in this section expands or restricts the Secretary's authority to inquire into the disposition of any firearm in the course of a criminal investigation."

**E. Public Law 103-159, 107 Stat. 1536**

The Statute under consideration also contains a proscription against registration. The chief law enforcement officer is required to destroy the Federal Form and any references to it within 20 business days if the proposed transfer would not violate federal, state, or local law. 18 U.S.C. § 922(s)(6)(B)(i).

Congress never envisioned that it was creating a registration system at the local law enforcement level. 18 U.S.C. §922(s) cannot be severed; it stands or falls as a whole.

The Statute was enacted with Congressional intent not



to impose registration. For example, Rep. Roukema explained that "the Brady bill in no way provides for a system of national gun registration--quite the opposite. In every instance where a handgun sale is approved under Brady, law enforcement officers must destroy the information they've been provided within 20 days." 139 Cong. Rec. H9106 (Nov. 10, 1993). Rep. Hushes agreed: "To help protect the privacy of legal purchasers, it [the bill] requires that a copy of the statement and other records of the transaction be destroyed within 20 days." *Id.* at H9117.

The Statute also requires the reporting of multiple handgun sales to State and local police and the destruction of those records within 20 days. 18 U.S.C. § 923(g)(3). This destruction requirement, Senator Dole explained, "eliminates the concern that this would be back door gun registration." 139 Cong. Rec. S16311 (Nov. 19, 1993).

Congress without a doubt intended not to enact any kind of registration scheme. The Statute, minus the unconstitutional parts, is contrary to Congressional intent, and thus the whole Statute must be voided.

## CONCLUSION

18 U.S.C. §922(s) exceeds the Commerce Clause powers delegated by the people to Congress, and violates principles of federalism guaranteed in the Tenth Amendment. Because excising the unconstitutional provisions creates a statute that Congress never intended, 18 U.S.C. § 922(s) is not severable. Amicus curiae respectfully submits that the Court should reverse the decision of the United States Court of Appeals for the Ninth Circuit and hold 18 U.S.C. §922(s) invalid.

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